No. 215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

IN RE WILLIAM OLIVER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR STATE BAR OF MICHIGAN, AMICUS CURIAE

State Bar of Michigan
Harry G. Gault, President

Wilber M. Brucker, Chairman,
Special Chairman, Committee
on One-man Grand Jury.

412 Olds Tower
Lansing, Michigan

FRANKLIN DE KLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN
1948

Index of Matter in Brief

Table of Cases

Constitutions —and— Statutes cited

No. 215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

IN RE WILLIAM OLIVER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR STATE BAR OF MICHIGAN, AMICUS CURIAE

With the permission of the Court given January 5, 1948, the following brief is submitted by the State Bar of Michigan, as *amicus curiae*. The State Bar of Michigan is vitally interested in the constitutionality of the one-man grand jury law of Michigan, which is involved in the instant case.

I

Opinions Below

The opinions delivered in the Michigan Supreme Court are officially reported: *In re Oliver*, 1947, 318 Mich. 7.

The opinions delivered in the Michigan Supreme Court in an earlier and correlated case that presented identical questions are officially reported: *In re Hartley*, 1947, 317 Mich. 441.

II

Jurisdiction

The jurisdiction of this Court was invoked under Section 237(b) of the Judicial Code, as amended, U.S.C. Title 28, Sec. 344(b).

The State Bar of Michigan seriously doubts the jurisdiction of this Court to hear and determine the question whether the return of a portion of the Circuit Court's transcript was a denial of 'due process' (see post, p. 22).

III

Statute Involved

The provisions of Section 17219 Compiled Laws of Mich. for 1929; Sec. 28.944 Mich. Stat. Ann. of the Michigan one-man grand jury law is involved. This section with the other three sections of that law, Sec. 17217-17220 Mich. Comp. Laws; Sec. 28.942-28945, are set forth in Appendix A, infra, p. (35).

IV

Questions Presented

1. Is it a denial of 'due process' to convict a witness of contempt of court summarily and without trial by jury when the misconduct is committed in the immediate presence of a Michigan Circuit Judge, who, in a judicial capacity, pursuant to the law of Michigan, is acting as a one-man grand jury in the conduct of an investigation of suspected criminal offenses?

2. Is it a denial of 'due process' for a Michigan one-man grand jury to convict a witness of contempt of court summarily and without trial by jury for giving evasive answers which are self-evident and material to an investigation of suspected criminal offenses, and thus obstructing justice?

3. Does this Court have jurisdiction to consider and determine the question whether the omission of portions of a transcript upon return by a Circuit Court to the Michigan Supreme Court constitute a denial 'due process' under the 14th Amendment, when it conclusively appears from the record that such question was never raised, considered nor decided by the Michigan Supreme Court?

V

Concise Statement of the Case

The Circuit Court of Oakland County, Michigan granted a petition for the holding of a one-man grand jury investigation (sec. 17217-17220 Mich. Comp. Laws) of 'gambling, operation of gambling devices, bribery of public officers and other crimes' in the County of Oakland. Hon. George B. Hartrick, Circuit Judge, was assigned to conduct the investigation. Hon. Frank L. Doty and Hon. H. Russel Holland, Circuit Judges of Oakland County, were acting in an advisory capacity to Circuit Judge Hartrick, who presided over the one-man grand jury investigation.

In the course of the inquiry, one William Oliver, owner and operator of 50 pin ball machines in Oakland County, was subpoened to appear on September 11, 1946 before Circuit Judge Hartrick pursuant to Sec. 17217 Mich. Comp. Laws. William Oliver appeared before Judge Hartrick

and the other two Circuit Judges of Oakland County. Petitioner Oliver had been previously interrogated in the same investigation on April 3, 1946, about 5 months earlier.

From the testimony of William Oliver his pin ball machines could be operated either legally or could be used for gambling purposes. It is transparent that the primary purpose of the investigation was to ascertain whether there was official misconduct on the part of law enforcing officers and this could, of course, be supplied only by those who participated in bribery for such purpose. The method was somewhat ingenious but simple. In September 1944 one C. E. Mitchell, doing business under the assumed name 'Midwest Bonding Company' (R 9) approached William Oliver who testified that Mitchell induced him to 'buy' certain instruments called 'bonds' which purported to 'guarantee reimbursement' to the county for 'extra' expenses (R 13) of prosecuting persons using the pin ball machines when 'anybody was caught gambling on the machines'. (R 12). Those who 'bought' the 'bonds' were given a 'little sticker' to put on their machines, which would plainly identify at a glance to anyone, including enforcement officials, those machines for which such payment had been made to Mitchell.

William Oliver also testified that he had discussed the project with other operators of pin ball machines (R 13); that he didn't think anything special about a stranger making a contract for the county (R 13); that his discussion with Mitchell had occurred in Mitchell's office (R 12). This is the only explanation given by Oliver why he 'bought' these 'bonds' and paid money to Mitchell. William Oliver also testified as to how he disposed of the bonds in the following manner: that he 'destroyed them' (R 10): that he 'must have threw them out' (R 11): 'threw them in the

waste paper basket' (R 11); 'probably threw them in the ash can' (R 11). He testified that he had never previously had such 'bonds' in his possession and that the destruction of such 'bonds' was 'an event' which had never happened before or since (R 11).

After the testimony of William Oliver was given, Judge Hartrick consulted his associates Judge Doty and Judge Holland about Oliver's story before convicting him of contempt. (R 14) Judge Hartrick was stricken with illness and was hospitalized almost immediately after the taking of this testimony and did not sign the Judgment and Sentence for contempt for giving false and evasive answers until September 14, 1946, 3 days after petitioner Oliver had been taken in custody. (R 10)

On September 14, 1946 a petition for writ of habeas corpus and ancillary writ of certiorari were filed in the Michigan Supreme Court by petitioner's attorney (R 2). These writs were issued forthwith (R 2). In his Answer Judge Hartrick asserted that petitioner Oliver had given false and evasive answers on material matters and returned all portions of the transcript of Oliver's testimony which were deemed material.

On October 17, 1946 a motion was filed by petitioner for a further return of 'the full testimony' for the reason that petitioner admitted the purchase of the bond referred to in the return and identified a duplicate of the bond submitted to him by Judge Hartrick; and that it would appear from a 'complete return' that petitioner could have no purpose in failing to produce the bond if it were in existence or in falsifying as to the circumstances of its disposal. (R 17) This motion was denied (R 19) by the Michigan Supreme Court and the cause was set for hearing Januarv

7, 1947 (R 20) at which time the cause was submitted on briefs (R 20). No question of 'due process' under the 14th Amendment with reference to the denial of petitioner's motion for 'the full testimony' was raised by petitioner or considered by the Michigan Supreme Court. (R 21-32) On May 16, 1947 the Michigan Supreme Court affirmed the Circuit Court's Judgment and dismissed the writs. (R 20) (R 22-28). An opinion signed by four justices dissented on the ground that it was not 'self-evident' from the record that the answers of petitioner Oliver were 'false and evasive'. (R 28-32)

VI

The Interest of the State Bar of Michigan

The State Bar of Michigan, an organization created in 1935 by the rules of the Supreme Court of the State of Michigan, as authorized by Act 58 of the Public Acts of Michigan for 1935, was granted permission on January 5, 1948, to file a Brief *Amicus Curiae* in the instant case.

The State Bar of Michigan is the Integrated Bar of the State of Michigan, composed of all of the active and practicing lawyers of the State of Michigan, numbering upwards of 6,800 lawyers.

The State Bar of Michigan at its Eleventh Annual Convention in Lansing, Michigan, in September 1946, authorized the appointment of a Special Committee to Study and Report Upon the One-man Grand Jury law in Michigan. A 15-Man Special Committee was thereupon duly appointed for such purpose, which Committee conducted a study of this law and its operation for the entire succeeding year. The majority of this Special Committee (12 members) in its

report recommended inter alia to the Twelfth Annual Convention of the State Bar of Michigan in Grand Rapids, Michigan in September 1947 that:

> "The One-Man Grand Jury Law should, with certain appropriate amendments, remain a part of the system of criminal jurisprudence for the State of Michigan."

This majority report after full debate, was adopted in its entirety.

The minority report (3 members), signed by William H. Gallagher (attorney for petitioner William Oliver), was also submitted, debated, and rejected. Both such reports are published in the September 1947 issue of the Michigan State Bar Journal at page 35, et seq.

In accordance with one of the recommendations in the majority report which was adopted by the State Bar Convention in September 1947 the Special Committee to Study and Report Upon the One-Man Grand Jury Law in Michigan was thereupon reappointed for another year to continue its work, and has been and is now engaged in considering matters in connection with the One-Man Grand Jury Law of Michigan.

The State Bar of Michigan has no direct interest in the outcome of the instant case. It has no reason to favor affirmance if the facts established by the record do not support the conviction of petitioner William Oliver. It likewise has no reason to favor affirmance if petitioner's rights to a review upon a full and complete record have been disregarded.

The State Bar of Michigan, however, does have an interest in correcting grossly misleading statements and infer-

ences presented to the Court which reflect unjustly upon Michigan courts. It does have an interest in challenging such statements and inferences when the Michigan Supreme Court is charged, in effect, with tolerating, if not encouraging, wholesale violations of constitutional rights. It feels a duty to correct misinformation upon which the Court is asked to draw such unfounded inferences.

VII

Origin and development of the one-man grand jury as a part of the criminal jurisprudence of Michigan.

Art. 1, Sec. 11 of the first Constitution adopted by the State of Michigan in 1835 provided that no person should be held for a criminal offense 'unless on the presentment or indictment of a grand jury', except in certain specified instances.

Art. 6, Sec. 28 of the Constitution adopted by Michigan in 1850 omitted that requirement and substituted therefore the 'right to be informed of the nature of the accusation'.

Until 1859 the securing of an indictment against an accused was performed by a 23-man grand jury for every criminal prosecution in Michigan. In that year the Legislature provided that the prosecuting attorney of each county should make his own investigation upon receipt of complaint of crime and should bring the matter before some justice of the peace or other magistrate who should conduct a preliminary examination to determine whether there was probable cause to believe that a crime had been committed and that the accused had committed it. Thereupon a warrant could be issued by such justice or magistrate. After preliminary examination held before the justice or magis-

trate or a waiver thereof, provisions were then made for prosecuting offenders by means of an 'Information filed by the prosecuting attorney.

After 1859 the 23-man grand jury was preserved as an institution of the Court, to be invoked by the circuit judge whenever conditions should warrant its being called. The 23-man grand jury became an extraordinary instrumentality called into use only occasionally and then for the purpose of investigating wide-spread corruption, usually of an official character.

In 1885 a Michigan Statute (Act 161, P. A. 1885), establishing the Detroit police court, gave investigational powers to police magistrates of a similar character to the one-man grand jury. In 1915 a Committee on Law Reform of the Michigan State Bar Association recommended the appointment of a Special Committee on Criminal Law and Procedure. This committee concentrated its efforts on certain specific improvements in criminal procedure, and in 1916 recommended a bill for the institution of proceedings for the discovery of crime, which report was published as a part of the proceedings of the Michigan State Bar Association in 1916.

In 1917 this bill was laid before the Michigan Legislature and was passed (Act 196, P. A. 1917), becoming the present one-man grand jury law, authorizing one Judge to preside over proceedings for the discovery of crime. It was later re-enacted in its entirety as a part of the Michigan Code of Criminal Procedure, chapter 7, sec. 3-6 incl. (Sec. 17217-17220 Mich. Comp. Laws 1929). (See Appendix A of this brief for the entire text of the law.)

The one-man grand jury law is short, concise, simple and direct: briefly it provides that whenever upon filing of com-

plaint, a judge shall have probable cause to suspect that any crime has been committed within his jurisdiction, and that any person may be able to give material evidence respecting such offense, such judge may require such person to attend as a witness and answer such questions as such judge may require concerning any violation of law. Also that the proceedings to summon witnesses and compel them to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process, and upon the return of such process served or executed, the judge shall proceed with the case in like manner as upon formal complaint.

Secrecy is enjoined upon all participating in the inquiry by application of the provisions of law relative to grand juries.

Witnesses who neglect or refuse to appear upon regular summons of the one-man grand jury 'or to answer questions —material to such inquiry' may be punished for contempt —although the sentence for contempt may in judicial discretion be commuted or suspended if the witness appears and answers such questions.

A witness who answers questions which might tend to incriminate him, is granted full immunity from prosecution for any offense concerning which he testifies.

Thirty years experience with the one-man grand jury law has demonstrated that it is a distinct improvement over the older methods for the investigation of crime. It is more flexible and is less unwieldy and cumbersome than a 23-man grand jury. A judge can proceed to hear a witness without waiting for 22 other men to convene, and without publicizing who the witness is, so as to avoid danger or reprisal againts the witness from those against whom such witness may testify. A judge can proceed patiently for a year or more upon some important and far-reaching investigation, recessing from time to time for one day or several weeks, during which time investigators can work, and then convene for an hour or for a half day, and recess again until more testimony is available. Such flexible procedure would be impossible for a 23-man grand jury from scattered homes in different parts of the county.

Also, prompt dispatch of business, immediate decisions, freedom of action and ability to take advantage of sudden 'breaks' or 'tips' characterize the work of the court under one judge to an extent never possible in a group of 23 men.

In addition, the one-man grand jury increases the likelihood that the investigation will be placed in skilled and expert hands. An experienced judge, trained in the criminal laws, familiar with the value and weight of various types of evidence, and with the art of dealing each day with witnesses and criminals is ideally equipped to do efficient, energetic and thorough work in presiding over the investigation of widespread corruption and official misconduct.

It will be noted that the Supreme Court of Michigan has many times during the thirty years during which the one-man grand jury law has been in force, upheld its constitutionality, and always by a unanimous decision. It has

expressly declared that this law serves a wholesome purpose, and that a judge assigned to preside over such an investigation is acting within the powers and obligations placed upon him by the Michigan Constitution.

VIII

The constitutional rights of Michigan citizens have not been "disregarded by the courts of Michigan" in their operation under the one-man grand jury law.

Petitioner's attorneys and the Lawyers Guild have asserted in their briefs and oral argument that constitutional rights of Michigan citizens have been flagrantly disregarded and trampled upon by the Courts of Michigan under the one-man grand jury law. It has been asserted that judges who are otherwise capable, conscientious and hold the confidence of the people of their respective communities, perpetrate all sorts of abuses upon witnesses in one-man grand jury investigations. They intimate that abuses occur in every investigation under the statute and in the case of every witness called to testify.

The State Bar of Michigan does not suggest that there has never been any abuse of the statute at any time. It is altogether likely that some abuses may have occurred at some time in the past 30 years. But petitioner's attorneys and the Lawyers Guild are badly mistaken in their sweeping assertions of wholesale abuses. They are likewise illogical in urging that the one-man grand jury law should be condemned and petitioner Oliver should go unpunished simply because in some other case some other official has transgressed the rules.

Instead of adhering to the record in the instant case, petitioner's attorneys and the Lawyers Guild have gone completely outside the record and have made a host of unsupported statements and have indulged in numerous unwarranted inferences derogatory to the one-man grand jury statute.

The State Bar of Michigan can best answer such sweeping charges by pointing out that twenty-nine Justices of the Michigan Supreme Court have had occasion to express themselves, many of them repeatedly upon matters now under discussion relating to the one-man grand jury law of Michigan. The list includes Justices John E. Bird, Russell C. Ostrander, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Grant Fellows, John W. Stone, Franz C. Kuhn, George M. Clark, Nelson Sharpe, Howard Wiest, John S. McDonald, Ernest A. Snow, Walter H. North, Richard H. Flannigan, Louis H. Fead, William W. Potter, Henry M. Butzel, Thomas A. E. Weadock, George E. Bushnell, Edward M. Sharpe, Harry S. Toy, Bert D. Chandler, Thomas F. McAllister, Emerson R. Boyles, Raymond W. Starr, Neil E. Reid, Leland W. Carr and John R. Dethmers. Not a single one of all these Justices of the Michigan Supreme Court have preceived any such flagrant departures from constitutional principles as are now urged by petitioner's attorneys and the Lawyers Guild.

In this same connection it is interesting to note that included among the 'Michigan Judges' who have presided over a one-man grand jury investigation of crime is Mr. Justice Frank Murphy, of this Court, who was at one time Judge of the Recorder's Court of the city of Detroit, and who made such salutary use of this law that it resulted in a wholesale clean-up of corruption in the city government

of Detroit. The following was said of Judge Murphy's work in June 1925:[*]

> "The budget director of the city of Detroit believed that he had found fraud in the delivery of supplies. Thereupon the county prosecutor petitioned the criminal court to assign one judge to sit as a grand jury and investigate.
>
> "Judge Frank Murphy was assigned to do this work and devoted a number of weeks to it. More than a hundred witnesses were examined and more than 4000

---

[*]

See: Vol. 9, No. 1, page 12, Journal of the American Judicature Society (June 1925). The article also states: "The investigation amounted to a thorough inquiry into the subject of graft in various public offices. It was powerful and effective enough to bring to bar officials of a paving concern alleged to have controlled all bids on paving and searching enough to reach down to instances of petty graft. * * * We believe it is safe to assert that no community in this country has ever had such a penetrating and thorough survey of irregularities in office. * * * We believe also that it is conservative to assert that the procedure afforded by the 'one man grand jury' law is the best that has been devised and should be brought to the attention of many persons who are now clamoring for law enforcement. This procedure appears to possess every advantage that can be claimed for the time-honored grand jury procedure and to be superior in a variety of ways. It centers responsibility in a conspicuous judicial officer who has adequate powers to get to the bottom of the most involved mess of rumors and charges. In the Detroit instance the judge was chosen especially for this assignment from the criminal court of that city. There was no dependence upon a large jury of untrained citizens called upon to neglect their private affairs for a period of many weeks. Every safeguard of judicial procedure surrounded the investigation. At its conclusion the judge had ample time to study the mass of testimony. Of course the hearings were ex parte, as they always must be prior to the issuing of warrants. This procedure insures even better than the accustomed grand jury procedure that witnesses will be protected by privacy and that secrecy will be maintained until the time shall have arrived for publicity."

pages of testimony taken. The State was represented by the county prosecutor, the corporation counsel and a special assistant to the latter. The taking of testimony was closed March 17 and a month later Judge Murphy wrote a letter to the prosecutor directing the prosecution of nineteen persons and exonerating others. The accused were officials of the city and county and contractors, and one was vice-president of a trust company. The charges were various: conspiracy, embezzlement, extortion and malfeasance in office."

Likewise it is conservatively estimated that ten thousand persons have appeared as witnesses under the one-man grand jury procedure in the past 30 years. Not all, but many of these witnesses were persons who had guilty knowledge about the conduct of themselves and others which they did not wish to disclose, and who would try to tell plausible stories which did not coincide with the truth. Accepting the statement of the Lawyers Guild, for the sake of the argument, that a considerable number of witnesses have been punished for contempt, they still constitute such a small percentage of the total as to refute the charge that judges have indulged in a practice of using their power as a method of terrorizing witnesses. If a witness falsifies or evades true answers about material matters, and the evidence is self-evident upon the transcript, he most certainly should be punished for contempt. That so few have been punished by comparison with the total number of witnesses who testified, does not prove that the average of truth-telling in Michigan has been higher than the average of witnesses generally, but rather that Michigan Judges have been acting with a great deal of restraint.

The loose charge that 'the Michigan statute has been viewed and applied in large measure as an autochthonous

grant to elected judges of extraordinary powers to act simultaneously as detectives, magistrates, and 23-man grand juries', (Brief of Lawyer's Guild, p. 11) is not in the slightest degree supported by the facts. Before there can be a trial there must be an accusation and in Michigan this may come about in any one of the following three ways:

A. An indictment voted by a 23-man grand jury.

B. A complaint against a specific person charging a specific offense before a *justice of the peace or other magistrate*, and a warrant issued by the justice or magistrate in the usual way.

C. A complaint *before a one-man grand jury* that a crime has been committed, but not naming any specific person, followed by an investigation and a warrant issued by the one-man grand jury under the Statute.

Thus the one-man grand jury is merely a logical and reasonable extension of ordinary criminal investigative procedure. Under the usual procedure of the general statute, Mich. Code of Criminal Procedure, chap. 6, § 2, Mich. Comp. Laws 1929, § 17194, Mich. Stat. Ann. § 28.920, witnesses may be produced before the magistrate to support the complaint against an accused before a warrant is issued. The one-man grand jury statute merely adds provision for secrecy, exactly as if witnesses were called before the common-law type of grand jury. The one-man grand jury statute merely simplifies and combines ordinary features of the usual methods.

The respondent is entitled to an examination before being bound over for trial. In case of the one-man grand jury, the law of Michigan was amended in 1947 to provide that

some magistrate other than the judge who acted as the one-man grand jury, shall conduct the examination. Hence the accused is entitled to a complete examination before being bound over for trial before some judge other than the judge who presided over the one-man grand jury, and thereafter the accused is entitled to a trial before a jury, presided over by a different judge.

Many of the same claims made by petitioner's attorneys and the Lawyers Guild were sifted by the Special Committee of the State Bar of Michigan in 1947 with the result contained in its report. It is interesting to note that the chief documentation for many of those statements and inferences is the minority report of the State Bar Committee signed by one of petitioner's attorneys, a magazine article written by one of petitioner's attorneys, and various newspaper interviews. It is chiefly upon this basis that petitioner's attorneys and the Lawyers Guild are attempting to create an atmosphere of illegality, without anything in the record of the instant case or any other reported case to support it.

The State Bar of Michigan believes the petition of William Oliver for Certiorari in the United States Supreme Court should stand or fall upon its own record; that the instant case should not be used as a vehicle for defaming or destroying confidence in the one-man grand jury law of Michigan; and that the sole aim in the instant case should be to ascertain whether anything calls for correction in the case of William Oliver, permitting the people of the State of Michigan to determine through their Legislature whether the one-man grand jury law should remain as a part of the criminal jurisprudence of Michigan.

IX

Michigan judges acting as one-man grand jurors do not "without restraint" engage in a practice of "summarily convicting citizens of contempt of court, even though they have never been before a court", and it was not done in the instant case.

It was asserted in the 'Reasons for Allowance of Writ' (R 5) that 'scores of Michigan citizens have been summarily convicted of contempt of Court, even though they have never been before a Court, by Judges acting as one-man grand jurors'. It is also asserted that 'the Judges do this without restraint'. (R 5)

This charge is untrue. The only excuse for such a statement is the possible claim that it is made in a 'legalistic' sense or is based upon petitioner's claim that the grand jury law as construed by the Michigan Supreme Court is unconstitutional.

Petitioner's claim has no foundation in the record in the instant case nor in the record of any other Michigan case. On the contrary, the Michigan Supreme Court has repeatedly held that a Circuit Judge, conducting a one-man grand jury proceeding under sections 17217-17220 Michigan Compiled Laws for 1929, is acting in a judicial capacity, and that the Circuit Judge conducting the one-man grand jury

proceeding has all of the power of the Circuit Court summarily to sentence a witness for contempt of court.

Mundy v. *McDonald*, (1921), 216 Mich. 444.

People v. *Doe*, (1924), 226 Mich. 5.

People v. *Wolfson*, (1933), 264 Mich. 409.

In re Slattery, (1945), 310 Mich. 458—(cert. denied 325 U.S. 876).

In this connection we would point out that a Circuit Judge, conducting a grand jury proceeding under this statute (sections 17217-17220 Mich. Compiled Laws for 1929), holds Court, summons witnesses, presides over the swearing and interrogating of witnesses, grants orders of immunity, maintains and signs the daily journal of the court, is expected to maintain the dignity of the court, and in every other way to conduct the functions of the Circuit Court.

Federal Courts are bound by the construction placed upon the statute of a State by its highest Court. This applies to the construction placed upon the one-man grand jury statute of the Michigan Supreme Court.

Slattery v. *MacDonald* (1945), 151 Fed. (2d) 326;
Cert. den. 326 U.S. 787;
rehearing den. 327 U.S. 814.

Section 5 of Chapter 7 of the Michigan Code of Criminal Procedure (Sec. 17219 Mich. Comp. Laws 1929) provides:

"• • any witness neglecting or refusing to answer any questions which such judge may require • • shall be deemed guilty of contempt."

The Michigan Supreme Court has construed the language of this statute and has held it to be an obstruction of justice punishable summarily as a direct contempt in the face of the court for a grand jury witness to refuse to tell what he knows, whether the refusal is absolute or by the substitute of evasive answers.

In re Slattery (1945), 310 Mich. 458;
Cert. den. 325 U.S. 876.

The Michigan Supreme Court has construed the language of the statute (Sec. 13910, 13911 Comp Laws. of Mich. for 1929) and has held that the Circuit Judge 'while acting as a one-man grand jury, may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith', and that the witness' contempt was committed in the face of the Court and required no extraneous proofs as to its occurrence. It was direct and there was no necessity to file charges, serve notice upon the accused and conduct a hearing.

In re Hartley (1947), 317 Mich. 441.

In the petition for the writ in the instant case, petitioner Oliver said (R 5):

"I testified in secret chambers and not in Court."

Here again we find a statement which is not true. The only excuse for such a statement is that it is used merely in a 'legalistic' sense. The truth is that petitioner Oliver testified *on the witness stand in the courtroom in the Court House before the Circuit Judge under examination by a Special Assistant Attorney General.* Petitioner cannot change the facts by using the nomenclature 'secret chambers.' The fact that it was "secret" is nothing unusual. All grand jury inquiries are conducted secretly. Nor can

the use of the word "chambers" change the fact that petitioner Oliver testified from the witness stand in the courtroom in the Court House, the regular place for holding Court, when the testimony was taken by the Circuit Court. It may be added that Circuit Court George B. Hartwick who was presiding over the One-Man Grand Jury, had previously called in Circuit Judge Frank L. Doty and Circuit Judge H. Russel Holland to sit with him throughout the proceeding in an advisory capacity. (R 8, 14)

Likewise there is nothing in the record to show that this grand jury proceeding was conducted in a "hide-out"; nor that it was held "in the middle of the night"; nor that William Oliver was subjected to torture, mental or otherwise; nor that William Oliver was ever intimidated by the Court or any of its officers. On the contrary the record clearly indicates that if William Oliver was in any terror, his apprehension of danger could well have come from fear of those whom his testimony might have involved, and that certain outside influences might have led him to give evasive testimony. As a matter of fact, if witnesses in other cases had been subjected to treatment of the kind indicated in the brief of the Lawyers Guild, by being coerced, put in fear, tortured or otherwise ill-treated, surely some of the numerous cases appealed to the Michigan Supreme Court (some of which have gone to the Supreme Court of the United States) would have disclosed the situation. Always such conduct, as in the instant case, is charged with respect to some "other case".

In any event there is no legal or factual foundation in the instant record for the assertion that petitioner William Oliver "was sentenced for contempt without being before a Court" and that "scores of Michigan citizens" have been similarly convicted "without even being before a Court."

X

The question of whether the return of a portion of the Circuit Court's transcript was a denial of "due process" under the 14th amendment was never presented to the Michigan Supreme Court; it was not properly raised and this Court lacks jurisdiction to hear and determine the same.

The question of whether petitioner Oliver was deprived of "due process" under the 14th Amendment on this ground (incomplete return) is raised in this Court for the first time and is therefore not properly before this Court. It was never raised nor presented to the Michigan Supreme Court at any time.

The order denying petitioner's motion for additional testimony was entered December 3, 1946. (R 19) and the cause was submitted on briefs January 7, 1947. (R 20) There is not the slightest intimation in the record or in the opinions of the Michigan Supreme Court that the question was ever raised before the Michigan Court that William Oliver was deprived of his liberty without "due process of law" in violation of the guarantee of the 14th Amendment on this ground (incomplete return). (R 22-32)

While it is true that the Michigan Supreme Court had entered judgment, petitioner, in applying to this Court for a Writ of Certiorari, alleged (R 5) as one of his "reasons for Allowance of Writ" that the Court below "has established the practice, as in the instant case, of permitting the grand juror to return only so much of the witness' testi-

mony as he sees fit to return", petitioner's attorneys still did not raise such question about "due process" under the 14th Amendment in his "Questions Presented" (R 4). Nor did petitioner's attorneys discuss the question at all in their original brief in this Court (B 8-12). Nor did petitioner's attorneys present the question of adequacy of remedy in their Reply Brief filed December 15, 1947, one day before the cause was argued orally in this Court. Nor was the question discussed in its Federal aspects in the brief filed by the Lawyers Guild. The Federal question was not raised until, encouraged by a question from the Bench, one of petitioner's attorneys contended orally that William Oliver had been denied due process under the 14th Amendment because the review by the Court below was upon a "partial record".

Rule 38 (2) of the Rules of the Supreme Court of the United States provides in part as follows:

> " * * Only the questions specifically brought forward by the petition for the writ of certiorari will be considered * * ."

The petition for certiorari set forth each point to be reviewed.

Clark v. *Willard* (1935), 294 U.S. 211; 79 L. Ed. 865

It has also been held that assignments of error cannot import into review any questions not raised below.

Missouri Pacific Railway v. *Fitzgerald* (1896) 160 U.S. 556; 40 Law Ed. 536

A point of error cannot be first raised in the petition for certiorari.

Helvering v. *Minnesota Tea Co.* (1935)
296 U.S. 378; 80 Law Ed. 284

Flournoy v. *Wiener* (1943)
321 U.S. 253; 88 L. Ed. 708; 64 S. Ct. 548

The question comes too late and should not, under the rules and opinions of this Court, receive any consideration.

XI

Assuming that the question of denial of "due process" under the 14th Amendment because of partial record had been properly raised, still petitioner was not deprived of any constitutional right of review.

One of petitioner's attorneys in the oral argument of the instant case on December 16, 1947, raised the question of whether petitioner had been denied 'due process' under the 14th Amendment. This charge is based upon the fact that the Michigan Supreme Court denied William Oliver's motion (R 17) for an order requiring the Circuit Judge to return 'the full testimony given by petitioner before said judge for the reason that said testimony will disclose that deponent freely and promptly admitted the purchase of the bond referred to in respondent's return and identified a duplicate of said bond submitted to him by said respondent * * *'.

In considering the return of the transcript of testimony by the one-man grand jury several important considerations must be kept in mind. The interest of the witness is, of course, important. So is the public interest in discovering

crime and defending itself against criminals. The interest of neither should be considered independent of the other.

It must be apparent to this Court that the purpose of the Grand Jury proceedings is to obtain the truth regarding widespread violations of the criminal law. Such an investigation is usually launched upon a large scale and in many cases relates to conspiracies which include unfaithful public officers. It is important that the legislative mandate of secrecy be maintained. To publish the entire transcript of the witness' testimony, without regard to the scope of the review or the materiality of the testimony to the points upon review, would, in most cases, reveal lines of inquiry which would give aid and comfort to every enemy of the law, including influential persons in high places who are suspected of crime. As a matter of fact it might even become profitable to "bait" the Court by deliberately planning an appeal on behalf of a minor witness in order to obtain a full transcript which would reveal to other interterested persons all direct as well as collateral lines of inquiry. Hence it would be highly improper arbitrarily to require in every case that every part of the transcript, including non-material portions, be returned regardless of materiality to the issues upon which the witness is convicted. While the Court should endeaver to avoid publishing names and particulars where that can be done without interfering with the review on a full record of the material proceedings, it should require the production of a full transcript of all material matters whenever necessary to the principal purpose of affording a fair and honest determination of the issues upon review. If the witness contends that the Court has omitted any material portion, he has a right to point out as definitely as possible what portions he contends have been omitted.

By Rule 72, § 1, par. (d), the Michigan Supreme Court has asserted that it has the power and duty to decide whether the record should be supplemented:

> "Section 1. The Supreme Court may, at any time, in addition to its general powers, in its discretion and on such terms as it deems just: . . . (d). Permit the transcript or record to be amended by correcting errors or adding matters which should have been included; . . ."

The State Bar of Michigan believes that in every case a witness convicted of contempt should have the right to have the Michigan Supreme Court determine to what extent the one-man grand jury's return should be supplemented by additional portions of the transcript in order to decide whether the witness has been properly convicted of contempt.

If the Michigan Supreme Court refuses to grant a witness convicted of contempt the right to supplement the record by additional portions of the transcript, and the witness still believes such additional portions are material and should have been returned, we believe *it becomes the duty of such witness to raise any question of denial of due process under the Fourteenth Amendment before the Michigan Supreme Court. If he does not do so he should not be allowed to raise the question before the Supreme Court of the United States.*

In the instant case it is significant that petitioner's affidavit and motion for a "return of the full testimony" (R 17, 18) were limited to the point that such testimony would show that the witness "freely and promptly admitted the purchase of the bond and identified a duplicate of the bond" (purchased by him from C. A. Mitchell). Grant-

ing everything that petitioner claimed, to the effect that a return of the full testimony would have shown that the witness admitted the purchase of the bond and identified a duplicate of the bond, there was no prejudice nor error in the slightest degree because the fact of the purchase of the bond as well as the identity of the form of the bond was not in question. Petitioner's contempt, upon which the Michigan Supreme Court affirmed his conviction, is not based upon any such points, as will be readily seen from a reading of the Court's Opinion (R 26-27). The Michigan Supreme Court accepted and recognized the fact that the witness admitted the purchase of the bonds as well as the *form* of the bond, but held that it was self-evident that petitioner's answers were false and evasive with reference to his *purpose in paying* the money to C. A. Michell for the bonds and also with reference to his *conflicting claims* as to how he *disposed of such bonds.* It would have been an idle ceremony to have granted petitioner's motion under such circumstances. Petitioner was not harmed in the least by the formal denial of his motion and it certainly cannot be said on this record that the remedy of review by the Court below was so inadequate as to deny "due process".

XII

Even if the return upon conviction for contempt omitted material portions of the transcript, this alone would not constitute a denial of "due process" under the 14th Amendment.

Petitioner's attorneys belatedly now assert that the omission upon conviction for contempt of material portions of the transcript, would in itself constitute a denial of "due process" under the 14th Amendment.

In the case of *Eilenbecker* v. *Dist. Court of Plymouth County, Iowa* (1889), 134 U.S. 31; 33 Law Ed. 801, it was held that the summary power to sentence for contempt pre-existed the 14th Amendment providing for "due process" and that the 14th Amendment does not affect this power. In that case petitioner was punished for contempt by the District Court for selling liquor contrary to court order. He sought to have his conviction set aside because it 'deprived him of the right to trial by jury under the 14th Amendment'. The issue was thus squarely presented to this Court whether the 14th Amendment affected the inherent power of a State Court to punish for contempt of its mandates. This Court held that the 14th Amendment had no such effect. The Court said:

> " * * It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it shall have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

The *Eilenbecker* case, supra, was cited with approval in *Camorata* v. *United States*, C.C.A. (3rd) 1940, 111 Fed. (2d) 243, Cert. den. 311 U.S. 651.

It would seem that inasmuch as this Court has held that the 14th Amendment does not affect the inherent power of a state court to punish for contempt, the question is foreclosed in the instant case,—even if the question had been timely raised.

XIII

Petitioner was not sentenced for contempt upon the mere basis of giving "unsatisfactory answers"; the Michigan Supreme Court had scrupulously adhered to the constitutional rule.

It has been asserted by petitioner's attorneys that petitioner was sentenced for contempt "when his answers did not satisfy his questioners". In addition it has been asserted by petitioner's attorneys and the Lawyers Guild that petitioner was convicted because the judge on his own opinion or suspicion decided that petitioner was untruthful, or because the judge had greater confidence in the veracity of other witnesses.

There is no foundation for such a charge. Nor was any such reason the basis for the Michigan Supreme Court affirming William Oliver's conviction. On the contrary the Michigan Supreme Court pointed out (R 22-28) with particularity the falsity and evasiveness of petitioner's testimony which, it said was self-evident from the transcript.

The Michigan Supreme Court has held that there must be either:

(a) an express admission of falsity, or answer so conflicting, inconsistent and contradictory that there is no other reasonable explanation except willful falsehood; or

(b) a claim of failure to recall or know about matters which the witness could not possibly fail to know or remember.

In all other cases the Michigan Supreme Court has held that a trial by jury after due notice is required.

Nothing could be more threadbare and repudiated than the claim that Michigan Courts allow a grand jury witness to be summarily sentenced when his answers "do not satisfy the judge".

In re Slattery (1945), 310 Mich. 458; Cert. den. 325 U.S. 876.

Whether there is sufficient in the record in a particular case for the reviewing court to say that falsity or evasiveness is self-evident is entirely different and apart from the question of whether there is in effect in Michigan a rule of law that requires such a showing as a condition precedent to any conviction for contempt. It has been pointed out in the instant case that the Michigan Supreme Court was equally divided in the two opinions handed down. But it will be observed that the Michigan Supreme Court was unanimous in announcing the constitutional rule.

Inasmuch as the Michigan Supreme Court has clearly announced the well-defined rule it ill becomes anyone to charge that Michigan Courts summarily sentence grand jury witnesses for merely giving "unsatisfactory answers". The record in the instant case proves that both opinions of the Michigan Supreme Court enunciated the same rule and continue to observe it. There may be disagreement upon whether the petitioner's answers, *as a matter of fact,* were false and evasive to a point where it is "*self-evident*" upon the record; but this is scant reason to indulge in a charge that in the instant case or in any other reported case the Michigan Supreme Court has followed an unconstitutional practice.

The State Bar of Michigan does not presume to favor affirmance if *the facts* in the instant case do not amount to "falsity and evasion which is self-evident upon the record."

We do not believe that the Supreme Court of the United States has any jurisdiction to reverse the instant case on the ground that it may differ from the Michigan Supreme Court on a decision of the facts, if the Michigan Supreme Court has applied the proper constitutional principles in arriving at its decision on the facts.

XIV

Conclusion

The State Bar of Michigan is interested in every procedure which safeguards the rights of individual citizens. It is also interested in seeing that the public shall be neither powerless nor unarmed in the ceaseless effort necessary to combat crime.

We submit that the numerous claims by petitioner's attorneys regarding procedure under the one-man grand jury law of Michigan, should be disregarded, and that consideration of this case shall be confined solely to those issues which are properly raised in this Court, and should be confined to the record in the instant case.

Respectfully Submitted,

State Bar of Michigan
Harry G. Gault, President

Wilber M. Brucker, Chairman,
Special Chairman, Committee
on One-man Grand Jury.

412 Olds Tower
Lansing, Michigan

Jan. 14, 1948.